STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v FLOYD PHILLIP ALLEN, Defendant-Appellant. _____/	Supreme Court No. Court of Appeals No. 318560 Ionia Circuit Court No. 2013-015693-FH

THE PEOPLE'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF QUESTION PRESENTED

1. Did the Court of Appeals misapply statutory language and contravene binding precedent when it rejected the habitual-offender enhancement of Allen's conviction?

   Appellant's answer: Yes.

   Appellee's answer: No.

   Trial court's answer: Yes.

   Court of Appeals' answer: No.

STATUTES INVOLVED

Section 9 of the sex offenders registration act provides in part:

> (1) Except as provided in subsections (2), (3), and (4), an individual required to be registered under this act who willfully violates this act is guilty of a felony punishable as follows:
>
> (a) If the individual has no prior convictions for a violation of this act, by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both.
>
> (b) If the individual has 1 prior conviction for a violation of this act, by imprisonment for not more than 7 years or a fine of not more than $5,000.00, or both.
>
> (c) If the individual has 2 or more prior convictions for violations of this act, by imprisonment for not more than 10 years or a fine of not more than $10,000.00, or both. [MCL 28.729.]

Chapter IX, § 10 of the code of criminal procedure provides in part:

> (1) If a person has been convicted of a felony or an attempt to commit a felony, . . . and that person commits a subsequent felony within this state, the person shall be punished upon conviction of the subsequent felony and sentencing under section 13 of this chapter as follows:
>
> (a) If the subsequent felony is punishable upon a first conviction by imprisonment for a term less than life, the court, except as otherwise provided . . . , may place the person on probation or sentence the person to imprisonment for a maximum term that is not more than 1-1/2 times the longest term prescribed for a first conviction of that offense or for a lesser term.
>
> * * *
>
> (3) A conviction shall not be used to enhance a sentence under this section if that conviction is used to enhance a sentence under a statute that prohibits use of the conviction for further enhancement under this section. [MCL 769.10.]

STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

The People seek leave to appeal the Court of Appeals order vacating Allen's sentence and remanding for resentencing. The trial court correctly sentenced Allen by both applying the sentencing provisions under § 9(1)(b) of the sex offenders registration act and enhancing the sentence under the second-offense habitual-offender statute. The Court of Appeals erred in holding that the two statutes are in conflict, and that the habitual-offender statute did not apply. The People respectfully ask this Court to reverse the published Court of Appeals decision and remand with instructions to reinstate the sentence the trial court originally imposed.

INTRODUCTION

Floyd Allen has been convicted of three crimes, and the question is whether he can be subject to a habitual-offender sentencing enhancement for the most recent offense. First, in 2007, he was convicted of fourth-degree criminal sexual conduct, MCL 750.520e. Second, in 2010, he was convicted of failing to register as a sex offender, MCL 28.729(1)(a) (SORA-1). Third, in 2013, he again failed to update his home address and accordingly was charged under a recidivist provision of the sex offenders registration act, MCL 28.729(1)(b) (SORA-2). After his last conviction, the trial court sentenced him, with no objection, under the second-offense habitual-offender enhancement, MCL 769.10 (HO-2). On appeal, Allen complained that his sentence should not have been enhanced both under SORA-2 (which creates a distinct offense for a second failure to register) and under HO-2 (which allows a sentencing enhancement for multiple felonies). The Court of Appeals agreed, ignoring controlling precedent from this Court (and from the Court of Appeals), and issued a published opinion vacating the valid sentence Allen received from the trial court and ordering Allen resentenced without the habitual-offender provision.

This case warrants review for a number of reasons.

- Leave is merited under MCR 7.302(B)(5), because "the decision conflicts with a Supreme Court decision," namely, *People v Bewersdorf*, 438 Mich 55, 74; 475 NW2d 231 (1991), which allowed a habitual-offender sentencing enhancement in conjunction with the offense of driving under the influence of intoxicating liquor on a third occasion, MCL 257.625(9)(c) (OUIL-3).

- Leave is merited under MCR 7.302(B)(5), because "the decision conflicts with . . . [other] decision[s] of the Court of Appeals," namely *People v Lynch*, 199 Mich App 422; 502 NW2d 345 (1993) (applying habitual-offender enhancement to fleeing and eluding,

second offense), *People v Brown*, 186 Mich App 350, 353–357; 463 NW2d 491 (1990) (applying habitual-offender enhancement to first-degree retail fraud, which was elevated from a second-degree offense because it was a second offense), and *People v Eilola*, 179 Mich App 315; 445 NW2d 490 (1989) (same).

- Leave is merited under MCR 7.302(B)(5), because "the decision is clearly erroneous and will cause material injustice." The Court of Appeals' misapplication of the relevant statutes, if uncorrected, will result in Allen receiving a maximum sentence two-thirds the length properly imposed by the trial court and authorized by the Legislature.

This Court should grant leave and reverse not only to correct the Court of Appeals' error in this case, but to reaffirm the principle that, when the Legislature creates different substantive crimes based on repeat offenses, courts *may* enhance those sentences using the habitual-offender statutes.

STATEMENT OF FACTS

The facts underlying Allen's conviction, which are laid out at length in the opinion below, are not relevant to the purely legal question presented here. Suffice it to say that Allen, a previously convicted sex offender, was not living at the address where he was registered under the sex offenders registration act, MCL 28.721 to 736 (SORA), and he was therefore guilty of violating SORA.

Because Allen had previously been convicted of failing to comply with SORA—that is, of violating MCL 28.729(1)(a) (SORA-1)—his second failure to register resulted in him being found guilty of a separate offense under § 9(1)(b) of that act, which provides for greater penalties for recidivist offenders. MCL 28.729(1)(b) (SORA-2). The prosecutor also sought enhancement under the second-offense habitual-offender statute, MCL 769.10 (HO-2).

PROCEEDINGS BELOW

Allen is convicted and sentenced in trial court.

Allen was charged with one count of willful violation of the sex offender registration act, second offense. MCL 28.729(1)(b). After a jury trial, Allen was convicted of the charge. The trial court sentenced Allen as a second-offense habitual offender, MCL 769.10, to 24 to 126 months' imprisonment.

Allen appeals and prevails on his sentencing claim.

Allen appealed, raising two challenges to his conviction (not relevant here) and one challenge to his sentence. Allen argued that the trial court erred in applying the habitual-offender sentencing enhancement (HO-2). The Michigan Court of Appeals agreed, and, in a published opinion, ordered the case remanded to the trial court for resentencing without the HO-2 enhancement.

ARGUMENT

I. The Court of Appeals misapplied statutory language and contravened binding precedent when it rejected the habitual-offender enhancement of Allen's conviction.

A. Issue Preservation

The People preserved this claim below by arguing in the Court of Appeals that Allen's sentence should be enhanced under HO-2. Allen, in contrast, did not preserve his claim (that the enhancement is improper) in the trial court.

B. Standard of Review

Because Allen did not raise a contemporaneous objection, the trial court's decision to apply the HO-2 sentencing enhancement is reviewed for plain error affecting Allen's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id.* at 763. Even if a defendant satisfies these elements, this Court should still not reverse unless "the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" independent of the defendant's innocence.'" *Id.* at 763–764.

The question is a legal question of statutory interpretation, which this Court reviews de novo. *People v Fetterley*, 229 Mich App 511, 525; 583 NW2d 199 (1998).

C. Analysis

The Court of Appeals erred in holding that the trial court plainly erred in applying the HO-2 sentencing enhancement to Allen's conviction. The court should have looked to this Court's decision in *People v Bewersdorf*, 438 Mich 55; 475 NW2d 231 (1991), the reasoning of which controls this question.

For certain categories of criminal offenses, our Legislature has created separate crimes out of subsequent violations. For example, someone who commits the act of third-degree retail fraud, but has been previously convicted of third-degree retail fraud, is guilty of second-degree retail fraud. MCL 750.356d(2).

Similarly, the act of second-retail fraud is elevated to first-degree retail fraud if the defendant has been previously convicted of second-degree retail fraud. MCL 750.356c(2). One who drives drunk or drugged is guilty of a crime, MCL 257.625(1) or (8) (OWI-1), but if that defendant has been previously convicted once, the Legislature has created a separate crime, MCL 257.625(9)(b) (OWI-2), and if previously convicted twice, that is yet another separate crime, MCL 257.625(9)(c) (OWI-3). *Bewersdorf*, 438 Mich at 68. The Legislature has created a similar scheme to punish fleeing and eluding a police officer. MCL 750.479a.

Relevant here, the Legislature has also created three separate crimes punishing the willful failure to register as a sex offender: If the offender has no prior convictions, under § 9(1)(a) of the sex offender registration act (SORA-1); if the offender has one prior, under SORA-2; and if the offender has at least two priors, under § 9(1)(c) (SORA-3). MCL 28.729(1).

Allen violated SORA, and he had one prior conviction of violating SORA. He was therefore convicted of SORA-2. This was Allen's *first* conviction of SORA-2. SORA-2 is punishable "by imprisonment for not more than 7 years or a fine of not more than $5,000.00, or both." MCL 28.729(1)(b). The HO-2 enhancement provides that, "[i]f a person has been convicted of a felony or an attempt to commit a felony, . . . and that person commits a subsequent felony within this state, the person shall be punished . . . as follows: (a) If the subsequent felony is punishable upon a first conviction by imprisonment for a term less than life, the court . . . may . . . sentence the person to imprisonment for a maximum term that is not more than 1-1/2 times

the longest term prescribed for a first conviction of that offense or for a lesser term." MCL 769.10(1). The longest term prescribed for a first conviction of SORA-2 is 7 years, therefore HO-2 allowed the trial court to sentence Allen to a maximum term of 10 and a half years. And that is the maximum term the trial court imposed.

The Court of Appeals reversed, based on a misunderstanding of the meaning of the phrase "first conviction of that offense." The Court of Appeals reasoned that "that offense" Allen was convicted of was failure to register as a sex offender, and referred to SORA-1 for the longest term prescribed for a first conviction (four years). But Allen was not convicted of SORA-1 for the second time. He was convicted of SORA-2—a distinct offense with a different element from SORA-1—for the *first* time. The Court of Appeals went on to hold that Allen could be subject to a sentence under SORA-1 enhanced by HO-2, resulting in a maximum of six years, or a sentence under SORA-2, unenhanced, resulting in a maximum of seven years.

In *Bewersdorf*, this Court addressed the identical legal question presented here, but with respect to the drunk-driving statutes rather than the SORA statutes.[1] This Court held that an OUIL-3 conviction *could* be enhanced using a habitual-offender enhancement, reversing the Court of Appeals' holding to the contrary. 438 Mich at 65–72.

[1] At the time *Bewersdorf* was decided, the offense was termed "OUIL" (for "operating under the influence of liquor"). In its present form, the statute forbids "OWI" (for "operating while intoxicated," and operating under the influence of alcoholic liquor is but one way to violate the statute. MCL 257.625(1). For purposes of the present issue, the terms may be used interchangeably.

Although the statutes at issue are different, there is no principled distinction between the question in *Bewersdorf* and that presented here. In both cases, the Legislature has created separate crimes out of repeated violations of the same criminal act. In both cases, the question is whether the habitual-offender statutes allow enhancing a sentence under the recidivist provisions. The only distinction between the statutes is that, in the OWI statute, the first two levels are misdemeanors, while under the SORA statute, all three levels are felonies, a fact that shows the legislature viewed all failures to register by sex-offenders to be serious offenses. Although the *Bewersdorf* Court said that it was "significant" that OUIL-1 and OUIL-2 are misdemeanors, that fact played no part in this Court's statutory construction analysis. 438 Mich at 71. Rather, the Court simply pointed out that the fact that the first two levels are misdemeanors meant that the defendant's argument, if accepted, would lead to a strange result—"assuring recidivist drunk drivers that there could be no increase in punishment for convictions after the third OUIL violation." *Id.* Similarly here, it would be odd to assure recidivist SORA violators that there could be no increase in punishment after they fail to register the third time.

The fact that the first two levels of OWI are misdemeanors and the first two levels of SORA are felonies has no effect on the question of what HO-2 means when it refers to "a first conviction of that offense." In *Bewersdorf*, this Court held that it meant OUIL-3, not OUIL-1. The Court of Appeals should have looked to

Bewersdorf for the answer here, and should have held that it referred to SORA-2, not SORA-1.

In addition, the Court of Appeals could have looked to its own prior published precedent. In *People v Eilola*, the question was whether a sentence for first-degree retail fraud under § 356c(2) (the recidivist provision) could be enhanced under the habitual-offender statutes. 179 Mich App 315, 319; 445 NW2d 490 (1989). The court held that it could. *Id.* at 321–322; accord *People v Brown*, 186 Mich App 350, 353–357; 463 NW2d 491 (1990), lv den 439 Mich 873 (1991).[2] In *People v Lynch*, the Court of Appeals addressed the question whether a sentence for fleeing and eluding, second offense, could be enhanced under the habitual-offender statutes. 199 Mich App 422, 423; 502 NW2d 345 (1993). Relying on *Eilola* and *Bewersdorf*, the court held that such enhancement was proper. *Id.* at 424.

It is not always the case that a court can use a habitual-offender statute to enhance a recidivist's sentence. For example, the public health code contains provisions that enhance the sentences of repeat offenders. MCL 333.7413(3). The Court of Appeals has held that a sentence enhanced under that subsection may not also be enhanced under the habitual-offender statutes. *People v Fetterley*, 229 Mich App 511, 540–541; 583 NW2d 199 (1998), citing *People v Elmore*, 94 Mich App 304;

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[2] In *Brown*, the Court of Appeals addressed the question, left open in *Eilola*, whether a prior conviction could be used to enhance a first-degree retail-fraud sentence under the habitual-offender statutes if it was also the prior retail-fraud conviction used to elevate the offense to first-degree retail fraud. 186 Mich App at 353. The court held that such enhancement was proper. *Id.* at 357. This Court held the leave application in abeyance for *Bewersdorf* before denying leave to appeal. 439 Mich at 873.

288 NW2d 416 (1979), and *People v Edmonds*, 93 Mich App 129; 285 NW2d 802 (1979). The *Fetterley* court explained that there was no conflict, because the distinction is between recidivist statutes that create separate offenses and those that create one offense and impose increasing sentences:

> We conclude that *Bewersdorf* and *Lynch* are consistent with *Eilola* and *Brown* and do not undermine *Edmonds* and *Elmore*. All four cases allow the enhancement under the general habitual offender provisions of felony convictions of *offenses* that include as an enhancing element the prior commission of a similar offense. None of these cases involved the general habitual enhancement already enhanced by a *sentencing* enhancement provisions such as that involved here. [*Fetterley*, 229 Mich App at 537.]

The *Fetterley* court later reiterated that enhancement under the habitual-offender statutes was proper "[w]here the legislative scheme pertaining to the underlying offenses elevates the offense, rather than enhances the punishment, on the basis of prior convictions[.]" *Id.* at 540.

The only question, then, is whether the SORA statute creates separate elevated offenses, or whether it creates a single offense, with enhanced sentencing based on multiple violations. The SORA statute is in this respect structurally identical to the OWI statute. Compare MCL 28.729(1) with MCL 257.625(9). It is also strikingly different from the controlled-substance repeat-offender statutes. Compare MCL 28.729(1) with MCL 333.7413. In *Bewersdorf*, this Court held that "OUIL-3 is a separate crime." 438 Mich at 68. In light of the similarity between § 625(9) of the motor vehicle code and § 9(1) of SORA, there is no basis to hold on one hand that OWI-3 is a separate crime, but on the other, that SORA-2 is not a

separate crime. SORA-2 *is* a separate crime, and a sentence for that crime may therefore be enhanced by the habitual-offender statutes.

The opinion below does not distinguish *Bewersdorf*, *Eilola*, *Lynch*, or *Brown*. Worse, it does not cite this Court's decision in *Bewersdorf*, nor its own previous decisions in *Eilola* or *Lynch*, at all, although the People alerted the court to the applicability of all three. (Pl's Br on Appeal, p 26.) The court cited *Brown* for the proposition that, when two statutes irreconcilably conflict, the more specific prevails over the less specific. Slip op. at 12. But it ignored *Brown*'s *holding*, which was that a recidivist statute like the one in this case does *not* irreconcilably conflict with the habitual-offender statutes.

The trial court did not err, much less plainly err, in applying the habitual-offender provision to enhance Allen's maximum sentence. The Court of Appeals' published holding was contrary to the statutory language, to *Bewersdorf*, and to Court of Appeals precedent. This Court should grant leave and reverse, or summarily reverse, in order to bring the law on enhancement of recidivist SORA violation sentences in line with that on OWI, fleeing and eluding, and retail fraud.

CONCLUSION AND RELIEF REQUESTED

Allen received his first SORA-2 conviction. Because he had a prior felony conviction, the trial court properly enhanced his sentence using the second-offense habitual-offender statute. The Court of Appeals erred in holding that this was plain error, and created erroneous law interpreting the SORA statute that contradicts law interpreting other recidivist sentencing schemes. Leave to appeal is merited to resolve these conflicting opinions.

For these reasons, the People respectfully request that this Court grant the People's application for leave to appeal or summarily reverse the Court of Appeals.

Respectfully submitted,

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